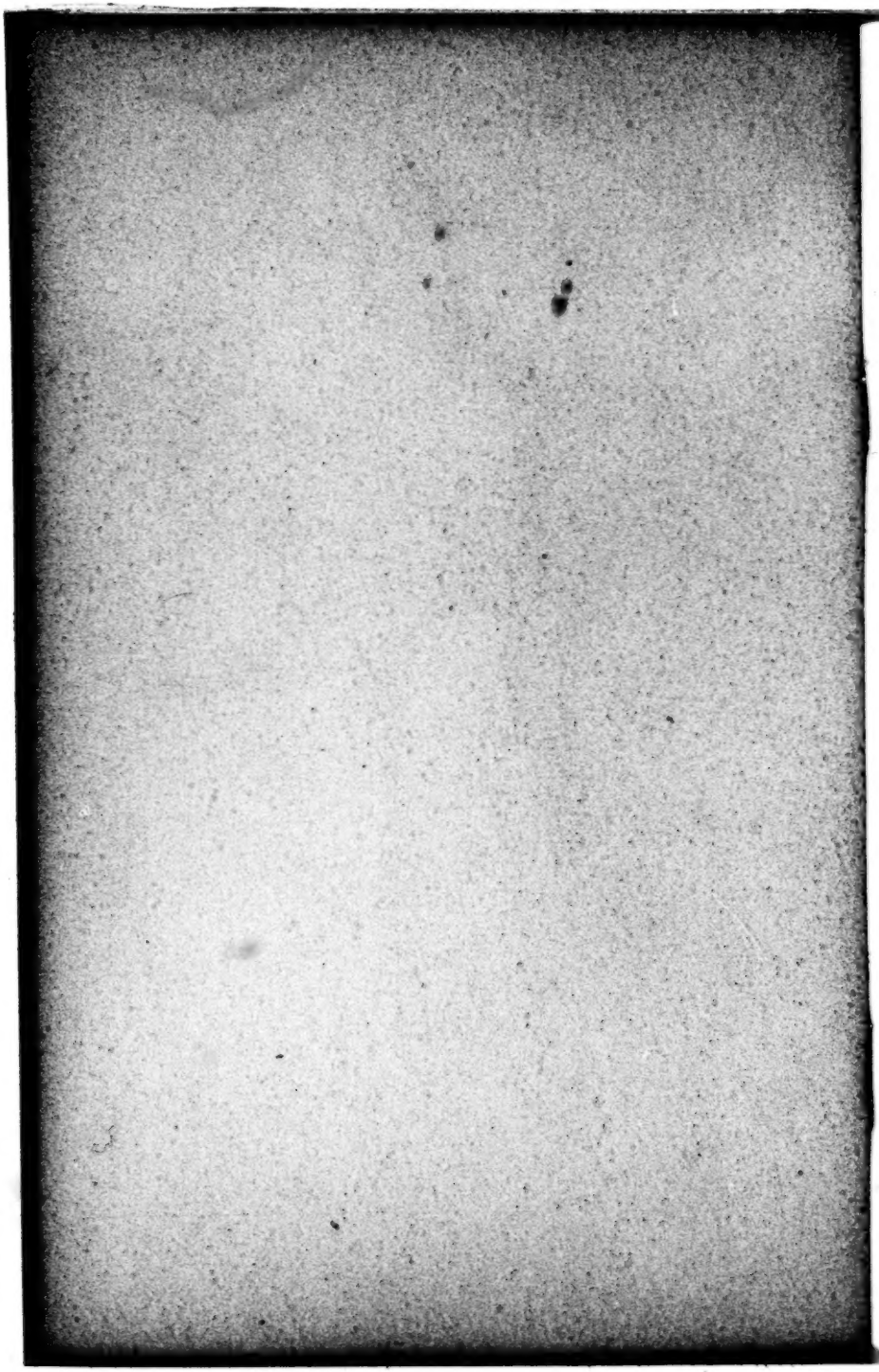

No. 72-6041

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

DAVE PERNELL,

Petitioner,

v.

SOUTHALL REALTY,

Respondent.

ON WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR RESPONDENT SOUTHALL REALTY

HERMAN MILLER
400 - 5th Street, N.W.
Washington, D.C. 20001
Attorney for Petitioner

Michael Ross
Of Counsel

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OPINION BELOW

Petitioner's recital is correct.

JURISDICTION

Adopted

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Adopted

QUESTIONS PRESENTED

Adopted

STATEMENT OF THE CASE

Adopted, except for the assertion that the legislative history reveals that Congress deemed the statutory guarantee to trial by jury superfluous in the light of Constitutional requirements.

SUMMARY OF ARGUMENT

Historical analysis discloses that the forcible entry and detainer statute in the D. C. Code, Chap. 15, 16-1501 (Sup. V 1972) is most closely analogous to the common law statute of forcible entry and detainer more particularly 8 Hen. VI c. 9 (1429). Under that statute actions were tried by jury before a justice of the peace. No right of appeal was permitted. Since a justice of the peace is not a judge, trial before him with jury is not trial by jury in the sense of the common rule of the Constitution. *Capital Traction v. Hof*, 174 U.S. 1 (1899). Therefore a trial pursuant to D. C. Code 16-1501 does not mandate trial by jury.

The fact that juries have decided landlord and tenant actions in the District of Columbia is based on neither Constitutional dictates nor Congressional design. Under the Organic Act of 1801, the District of Columbia inherited the Maryland practice of trying landlord and tenant disputes before a justice of the peace and jury with no right of appeal. This was the same mode of trial which had prevailed in England.

D. C. Code 16-1501 provides a speedy summary proceeding whereby the landlord may recover possession of his property for non-payment of rent as soon as his right accrues. The summary nature of such legal process has been consistently maintained in the English statutes of forcible entry and detainer, and in all the District of Columbia laws concerning landlord and tenant eviction

proceedings including the Maryland law adopted in 1801. It is a confirmation of the protection under law of citizens' property rights.

Federal and District of Columbia courts have consistently ruled that a tenant may defend in an action his landlord brings for repossession for non-payment of rent only by way of equitable relief. This is also the law in California and New York. To permit the tenant to claim a money judgment i.e. defense by a legal claim as Landlord and Tenant Rule 5(b) seems to suggest is not only contrary to the well settled rule in the District of Columbia but also destroys the summary nature of the possessory action. Such destruction compels the landlord to maintain a tenant in possession while the tenant's legal claim is adjudicated. For the law to force a landlord to keep on the premises one who declines to pay rent and who intends to vacate such premises only after his legal claim has been adjudged, is violative of the landlord's rights under the Due Process clause of the Constitution.

ARGUMENT

I.

THE SEVENTH AMENDMENT DOES NOT GUARANTEE A TENANT A RIGHT TO TRIAL BY JURY WHEN THE LANDLORD SEEKS REPOSSESSION OF HIS PROPERTY FOR NON-PAYMENT OF RENT.

A. Trial by Jury Within the Meaning of the Seventh Amendment as Viewed in the Context of the Common Law is a Trial by a Jury in a Court Controlled Only by a Judge.

In construing the Seventh Amendment providing for the preservation of trial by jury in suits at common law the principle of construction adopted by this Court has been to examine the right of trial by jury as it existed under English Common law when the Seventh Amendment was adopted in 1791. *Parsons v. Bedford* 28 U.S. 433 (1830); *Baltimore and Carolina Line v. Redman*, 295 U.S. 654, 657 (1935).

That the right to jury trial under common law means the right to have the facts of the case examined by a jury, which jury shall be supervised at all times during the trial of the case by a judge only, when clearly established by this Court in *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899).

Mr. Justice Gray in that opinion traces the historical development of trial by jury under common law and its introduction into the Colonies. It was his view from a reading of history that trial by jury with a judge was the intendment of the Colonies as expressed in their Constitution and the Framers of the Constitution—for trial by jury under the common law of England was only such trial. This of course did not mean that trial by jury

supervised by a judge was the only method of jury trial in England. For example justices of the peace were authorized by English statutes to summon jurors to inquire whether any forcible entry was made on land or whether land was being forcibly detained. 8 Hen. VI C.9. Trial before justice of the peace was adopted in Maryland, Md. Constitution 1776.

B. Trial by Justice of the Peace-Jury and Subsequent Courts in the District of Columbia of Possessory Actions for Property.

By virtue of the Organic Act of 1801, 2 Stat. 107, justices of the peace became part of the civil jurisdiction of the District of Columbia and their role in the development of that jurisdiction has been summarized as follows:

* * * * *

DISTRICT OF COLUMBIA COURT OF GENERAL SESSIONS

1. History of the Court

"Civil Jurisdiction Prior to 1942

The history of the District of Columbia Court of General Sessions is traceable back to that part of the Organic Act of 1801 which provided for the appointment of Justices of the Peace and vested them with all the duties required of Justices of the Peace in those parts of the District for which they had been appointed in all matters civil and criminal and those relating to keeping the peace. The Justices of the Peace were not a court of record and, very clearly, were not a part of the federal judicial system. *United States v. Mills*, 11 App. D.C. 500, 507 (1897). The act did not require that the Justices be learned or experienced in the law, the only

requirement being that they be 'discreet persons.'

The Justices were a carryover form the minor courts of England, such as the courts baron and the magistrates courts of the colonies and their sole function was to handle 'petty' claims and 'petty' offenses that were too minor to warrant the time and attention of the courts of general jurisdiction. *United States ex rel Brightwood Ry. v. O'Neal*, 10 App. D. C. 205, 233 (1897), aff'd *Capital Traction Co. v. Hof*, 174 U.S. 1. The civil jurisdiction of the Justices of the Peace was limited to cases involving no more than twenty dollars, a limitation which was apparently suggested by the Constitutional entitlement to a jury trial in all civil cases involving more than that amount. *United States ex rel Brightwood Ry. v. O'Neal, supra.*

As noted in the foregoing discussion of the history of the District Court, the civil jurisdiction of the Justices of the Peace was gradually increased over the next hundred years. This jurisdiction was increased to fifty dollars in 1823 and to $100 in 1867 (concurrent with the Supreme Court of the District in actions above fifty dollars). In 1895 the jurisdiction was increased to $300, with exclusive jurisdiction up to $100.

These increases in jurisdictional amount were not, however, accompanied by any corresponding increase in the judicial stature of the Justices. The court of the Justices remained a petty tribunal. The Act of 1823 subjected their decisions to de novo review by the Circuit Court in all cases where the amount in controversy exceeded five dollars. Although that Act did empower the Justices to empound jurors and conduct trial by jury, this was not a jury trial in the constitutional sense and on appeal either party could demand that the case be retried by a jury of the Circuit Court, *Capital*

Traction Co. v. Hof, 174 U.S. 1, 39 (1899). The Court in that case went on to remark that 'a justice of the peace, having no other powers than those conferred by Congress on such an officer in the District of Columbia, was not, properly speaking, a judge or his tribunal a court; least of all a court of record.'

The Act of March 3, 1901, officially constituted the Justices of the Peace as an inferior Court of the District of Columbia. The new Court has exclusive jurisdiction over civil actions formerly within the power of the Justices of the Peace where the amount claimed did not exceed $50. Jurisdiction was concurrent with the Supreme Court from $50 to $300 and in cases of concurrent jurisdiction, the case could be removed to the Supreme Court by certiorari. Moreover, in cases involving more than $5 either party could still appeal to the Supreme Court, where a trial de novo could be obtained.

The Act of February 17, 1909, changed the name of the Justice of the Peace Court to the Municipal Court of the District of Columbia, and the jurisdictional amount was increased to $500 with exclusive jurisdiction up to $100.

The Municipal Court was not a court of record; there was no provision for trial by jury; the Court had no equity powers. It was, in essence, simply a continuation of the Justice of the Peace Court under a new name. Like its predecessor, it was an inferior court similar in jurisdiction to the Justice of the Peace courts in the States and occupied, in the judicial system of the District, the same relationship as a Justice of the Peace Court does to the Courts of a State. It has been observed that the purpose of the Municipal Court (like its predecessors) was to provide a tribunal for the speedy disposition of a large number of small claims.

The Act of March 3, 1921, brought about the first major overhaul of the Municipal Court. That Act enlarged the exclusive jurisdiction of $1000. It also gave the Court jurisdiction over civil actions for assault, assault and battery, slander, libel, malicious prosecution, and breach of promise to marry. The Court was made a Court of Record. A system of jury trials was instituted. The right of removal and appeal to the Supreme Court was abolished. Appeal was authorized to the Court of Appeals for the District of Columbia upon a petition to any Justice thereof, the grant of which was discretionary. The Court was given the power to make rules of practice.

This Act appears to be an obvious attempt to upgrade the Municipal Court and to channel into it local cases of a more important nature. It also appears clear that Congress wished to retian the ability of the Court to deal swiftly with a large number of small cases. In *Schwartz v. Murphy* the Court noted that the Municipal Court was not given jurisdiction to try title to land because to do so would clog the Docket and dilute this major purpose of the Court. * * * 573, 574 Hearings on S 1066, et al. Before the Senate Committee on the District of Columbia and Senate Subcommittee of the Comm. in the Judiciary; 91st Congress, 1st Session, Part 3. (Footnotes omitted)

Landlords since the creation of the District of Columbia have tried their possessory actions before justice of the peace and successor tribunals to where today the lineage rests with Landlord and Tenant Branch, Superior Court for the District of Columbia.

C. Trial by Justices of the Peace-Jury of Possessory Actions, Without Right to De Novo Trial in a Court of Record is not Trial by Jury Under the Seventh Amendment.

The Seventh Amendment is applicable to the District of Columbia in civil ~~as well as criminal~~ cases. *Capital Traction v. Hof, supra*. From 1801 to 1823, trials in the District of Columbia were held by justice of the peace-jury without right of appeal. Such a trial was not a jury trial in the meaning of the Seventh Amendment. In 1823 de novo appeal to the Circuit Court was granted. 3 Stat. 743. However that law indicates that the de novo trial was available only in appeals from justice of peace-jury trials in actions involving debts. No mention is made of any right to appeal from the justice of the peace-jury in processory actions to recover land. This Court in *Capital Traction v. Hof*, tracing the development of 3 Stat. 743 commented that the Statute was based upon New York Statutes and the Maryland Statute of 1809 c. 76. Those statutes were concerned with appeals de novo from justice of the peace-jury trials on actions of debt or damages. Since this Court's decision in *Capital Traction v. Hof*, p. 39-41 indicates that Chief Justice Cranch in the Circuit Court had adjuged albeit erroneously in *Smith v. Chase*, 3 Cranch C. C. 351 (1828) and other cases that no appeal de novo could be had from a justice of the peace-jury trial for such trial would require the re-examination of facts found by a jury, in contravention of the Seventh Amendment, judicial authority is lacking on whether 3 Stat. 743 was made applicable to justice of the peace-jury trials for the recovery of repossession of land.

It is our view that appeals from justice of the peace-jury trials were not available in landlord and tenant

actions for two reasons. Firstly, there is the holding of Chief Justice Cranch in 3 Cranch C. C. 351 that:

> "* * *this court has no common law appellate jurisdiction to revise the judgments of justices of the peace either by writ of error, writ of false judgment or certiorari* * * *."

Secondly, the language in 3 Stat. 743 which concerns appeals from justice of the peace-jury trials pertains only to debts. It appears that both the judicial and legislative branches of government concerned with District of Columbia affairs at that time intended to retain the summary characteristics of the proceeding by which the owner invokes the aid of the justice of the peace in seeking repossession of his land. This was the state of the procedural law and jurisdictional law pertaining to landlord and tenant relationship in the District of Columbia until 1864, when in 13 Stat. 383 Congress redefined landlord and tenant proceedings and also provided right to trial de novo before a jury in the Supreme Court of the District of Columbia only if trial was held by justice of the peace sitting alone. Accordingly from 1801 until 1864, Congress did not authorize the courts in the District of Columbia to entertain appeals from actions brought by owners seeking repossession of their property by virtue of justice of the peace-jury trials. Congress's action in this regard, in our judgment, is consistent with the substantive rights which an owner has to have a summary process of repossession for his land which had its beginning in 1801 in the District of Columbia with the Act of Maryland 1793, Ch. 43.

We contend that the need for the summary nature of the proceeding in the District of Columbia to recover one's land which began then must be continued in such

proceedings brought today. The concept of ownership of one's property has not changed from 1801 to the present day. An owner's right under law to recover immediately his property when his possessory rights accrue is fundamental to the concept of private property rights under our political system. The lower court held that petitioners right to trial by jury be denied because trial by jury in the District of Columbia at its inception in landlord and tenant possessory actions, was not conducted in a common law court. They were conducted before justices of the peace and jury and such trials did not meet the definition of the common law court trial required by the Constitution as defined in *Capital Traction v. Hof, supra*. This Court's decision in *Block v. Hirsh*, 256 U.S. 135 1921 was cited by the lower court as authority that right to jury trial in summary possessory proceedings depended wholly on statute. Petitioner asserts that (Petitioner's Brief p. 39-40) this Court's decision was indicative of the principle that Congress may temporarily impinge Seventh Amendment rights when enacting temporary emergency legislation. However it is of interest to note that the vigorous dissenting opinion in that decision supporting the minority's position that the emergency legislation violated Fifth Amendment Rights of Due Process of the lessor and hence the legislation was unconstitutional, makes no mention of the lessor's right to a jury trial under the Seventh Amendment.

D. The Closest Historical Analogy to a Summary Proceeding Wherein the Landlord Seeks Repossession of His Property for Non-payment of Rent was the English Statutes of Forcible Entry and Detainer Which were not Tried in Common Law Courts.

Petitioner's brief (p. 25-31) seeks to demonstrate that the landlord's action is one which must be tried by jury

because it is a refinement of English real property actions—the assize of novel dissension, the writ of entry and the action of ejectment. He finds support in decisions of this Court wherein it is stated to the effect that all actions to recover real property are legal actions; thus being legal actions the parties are entitled to Seventh Amendment rights. *Scott v. Neeley*, 170 U.S. 106, 110 (1891); *Whitehead v. Shattuck*, 138 U.S. 146 (1891); *Ross v. Berhard*, 396 U.S. 531 (1970). The cases cited are all distinguishable on their facts since none involved a landlord seeking repossession of his property for non-payment of rent.

The guiding principle established by this Court in interpreting the application of the Seventh Amendment to controversies in civil actions has been to determine by historical analysis what the Framers intended in 1791 the year of the adoption of the Bill of Rights. Accordingly, it has been held that rights of trial by jury is preserved by the Seventh Amendment if the right is one which existed under the English common law at the time of adoption. *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935); *American Publishing Co. v. Fisher*, 166 U.S. 464, 468 (1897).

The Act of Maryland 1793, Chapter 43, was adopted as part of the law of the District of Columbia by virtue of the Organic Act of 1801. The Maryland law provides a summary mode for recovery of possession of land and tenements from tenants holding for years or at will after the expiration of a tenancy which provided for a complaint before two justices of the peace, a notice to quit and a trial by jury. The sole issue before the jury was a determination that the lease had expired, that notice had been given to the tenant to quit, which the tenant

refused to do. After the jury's determination, a writ of restitution for possession of the property was to be given by the justices to the sheriff for the lessor's repossession of his lands. If the tenant claimed a right to possession by virtue of a title to the lands then such title was prosecuted at the County Court and the writ of restitution withheld pending that determination. The tenant could appeal his dispossession by way of a writ of certiorari to the County Court which exercised a quasi appellate jurisdiction. *Rawlings v. Rawlings*, 3 H. and McH. 254 (1796).

The Maryland Court in *Crockett v. Parke*, 7 Gill 181 (1848) on an appeal to its court from a county court appellate review by way of certiorari to a justice of the peace-jury trial under law of 1793, Ch. 43 ruled that the appeal could not be granted from the County Courts. To do so the Court held would defeat the Assembly's intention that Maryland Act of 1793, Ch. 43 provided a swift and speedy process for recovery of the owner's lands and tenements.

The summary nature of the proceeding was again apparent in the case of *Mousley v. Wilson*, 1 Md. Ch. 301 (1848). There the Chancellor, High Court of Chancery ruled that under the Act of 1793, Ch. 43 the justice of the peace was only authorized to forbear restoring the landlord to possession when title was disputed. In Maryland a justice of the peace court is not considered a court of law. *Weikel v. Cate*, 58 Md. 105 (1882). In 1864 Congress passed its first law 13 Stat. 383 for the District of Columbia establishing a procedure for the landlord to dispossess one unlawfully in possession. The law provided in part when "forcible entry is made or when a peaceable entry is made and the possession unlawfully held by force, or when the possession is held without right, after the estate is determined by the terms of the lease by its

own limitation, or by notice to quit or otherwise." Trial was to be held before a justice of the peace with no authority to try title.

Mr. Justice Gray in his opinion in *Willis v. Eastern Trust & Banking Co.*, 169 U.S. 295, commented that the District of Columbia law was patterned after a law adopted by the State of Massachusetts in 1836, as amended in 1860. The resemblance of the two laws was so similar that in his view when Congress enacted its law it was aware of the construction which the Massachusetts law received in its Courts and accordingly Congress adopted the Massachusetts construction.

The Massachusetts Court in interpreting the historical development of the revised Statute of Massachusetts 1836 stated in part,

> "Before 1620 there were many English statutes and decisions upon the general subject of forcible entry and detainer. See Sts. 2 Edw. III. c. 3, prohibiting force; 5 Rich. II. c. 8; 15 Rich. II. c. 2; 4 Hen. IV. c. 8; 8 Hen. VI. c. 9; 31 Eliz. c. 11; 21 James I. c. 15' Cromp. 76, 163; Dalt. c. 125; Com. Dig. (Forcible Entry); 4 Bl. Com. 148. The state of the early law was considered in the decisions of this court in *Commonwealth v. Shattuck*, 4 Cush. 141; *Howard v. Merriam*, 5 Cush. 563; *Presbrey v. Presbrey*, 13 Allen 281; *Hodgkins v. Price* 132 Mass. 196. It would seem that every forcible entry by private individual was unlawful, and might subject him to punishment, and that in addition, in most cases, the person forcibly put out of possession might be put back by legal proceedings without regard to the question of the true title or right of possession. Ordinarily, the status of possession before the force was restored by the interference of the public power acting through public officers."

Page v. Dwight, 170 Mass. 29, 30 (1876); *Boyle v. Boyle*, 121 Mass. 85 (1876).

The summary proceeding statute of Massachusetts had its roots in the old English statutes of forcible entry and detainer which were supplemented by the Massachusetts legislature to include a summary remedy to settle disputes between landlords and tenants. In the light of the interpretation by the Massachusetts courts as adopted by this Court in *Willis* it is hardly likely that the ancestor of current summary proceedings given to landlords had its basis in the ancient writs of ejectment and writs of novel disseisin. The writ of novel disseisin has been lost in English antiquity while the writ of ejectment has been maintained to the current day as an action in ejectment whereby one seeks to obtain title to his property.

The Municipal Court of Appeals for the District of Columbia 1944, *Thurston v. Anderson*, 40 A.2d 342 (1944) in interpreting 11 D. C. Code 735, 1940, the landlord and tenant statute of 1940, asserted that the statute was originally based on the 1864 statute which although re-enacted (without change) in RS of 1874 with added clauses in Code of 1901 and 1929 was essentially the same as the 1864 law so the court was bound by this Court's decision in *Willis* and held that on page 344,

> "The act was declared to have been an adoption for this jurisdiction of the Massachusetts statute relating to actions of forcible entry and detainer. Its enactment by Congress, the court held, imported into its provisions the interpretation they had previously received in the Massachusetts court."

The District of Columbia Court ruled that the District of Columbia summary proceeding statute was neither a substitute for ejectment nor was a substitute for an action of trespass.

Trial by justice of the peace in England was not a trial in a common law court. One of the primary functions of the justice of the peace was to preserve the King's order and in this connection he was given the authority to inquire pertaining to forcible entry and detainer. Appeals from trials held by justices of the peace were not a matter of right but by certiorari. Another method of seeking redress from one who believed himself grieved by a justice of the peace would be to appeal to a justice of the peace residing nearby and failing that, appeal to the King or his chancellor, who might examine the complaint to determine if the justice of the peace ought to be removed from office. Beard, Justice of the Peace in England. McVicker "The Seventeenth Century Justice of the Peace in England," 24 Ky. Journal 387 (1936).

The progenitor of the Maryland Statute Act of 1793 and the initial law in the District of Columbia dealing with landlord and tenant relations Act of Congress, 1864, c. 3 are not predicated upon the writ of ejectment, the writ of entry or writ of novel desseisin as asserted by the petitioner. Historically summary process for repossession of real property by landlords arose out of the English common law by virtue of various statutes pertaining to the forcible entry and forcible detainer of lands by persons who exerted superior force and thereby ousted the persons in possession from that possession. The fundamental purpose of the statute was to prevent breaches of the peace and self help by those persons entitled to possession; 3 B. Com. 179; 4 Bl. Com. 148.

The English statutes described in detail in IV Bacon Abridgment of the Law 321-334 (Bouvier ed) and the cases cited therein clearly discloses that the forcible entry and detainer statute enforcement fell within the responsibility of the justice of the peace. The justice would hear

the complaint, direct the sheriff to summon a jury and resotre the party put out to possession on the verdict of the jury. Questions of title were not considered by the justice of the peace.

There is no doubt that landlord and tenant actions are most numerous in our urban society. Perhaps the trend toward increased condominium ownership is indicative of a reduction of summary process actions. If so, the courts may be adjudicating fewer disputes involving property for in the District of Columbia and in many states foreclosures of deeds of trust or mortgages do not invoke judicial assistance.

Perhaps the non-invocation of judicial assistance by common law courts was uppermost in the minds of English landlords when they turned away almost entirely from writs of ejectment and related real actions, either because they could not understand them or found them too cumbersome, and sought recovery of their land using the remedy provided in the statute of 8 Hen. VI in a justice of the peace proceeding. 1 Hale, History of Common Law 296-301 (Runnington ed. 1794); 3 Reeves History of English Law 488 (Finlason ed. 1880).

By 1886 one who had forcibly obtained or unlawfully detained possession of lands could be summarily removed and possession restored to the person entitled by means of summary procedures available in every state. These procedures were brought before justices of the peace in all states, except North Carolina, and immediate relief was granted unless a plea of title was made which deprived the justice of the peace of jurisdiction. Murfree, The Justice of the Peace, 558 (1996). It would seem that if the proceeding for repossession of property by landlords were relegated by the various states to their most inferior tribunals which were not considered courts of law, that it was intended that the rules of evidence, strict

pleadings and proof normally associated with a trial before a court were not needed nor desirable. To have permitted this would be inconsistent with the nature of the summary proceeding. See also 3A Thompson, Real Property, par. 1370, and cases cited for the proposition that statutes relative to actions of summary process for possession by a landlord conferred new rights and prescribed a course of proceeding unknown to common law.

We contend that the historical analysis of the action of forcible entry and detainer which in the first instance sought to quiet breaches of the peace, when examined within the framework of English common law, was an action of perhaps no greater significance than a petty crime punishable without jury.

Since rights to ownership of land were the keystone to the development of English common law and since the jury was integral to the resolution of landowner's rights, it is not surprising that the common law required a jury trial for a breach of peace which took place on private property. The right to peaceful possession was achieved by the force being removed under the authority of the justice of the peace after jury trial, and not by a jury's determination of ownership rights to the property.

In our modern society summary proceedings available to the landlord to regain his unlawfully detained property have by law been made available to him to prevent him from using self-help—which may lead to a breach of the peace. The common law right to self-help still exists in the District of Columbia, *Snitman v. Goodman*, 118 A.2d 394 (1955). The action available to his English ancestor under common law, accrued as soon as the force or the breach of the peace took place. The rights sought to be protected are identical—that is the right to possession of one's property—to the Englishman after the force

has occurred–to the American to avoid force. Under English common law such right under the circumstances described did not warrant a trial in a common law court and none was provided. Accordingly the Seventh Amendment does not command a jury trial.

Although the legislative history concerning repeal of the jury right is not clear, it could be argued that Congress intended to expedite the trial of local matters especially in view of the fact that it increased the number of judges in the Superior Court to 44 from the 16 formerly in the Court of General Sessions. To conclude that Congress repealed the statutory right to jury trials pertaining to the repossession of real property was "superfluous in the light of Constitutional jury trial requirements" misreads Congress's careful consideration of Constitutional principles in the same Act which repealed the legislative right to trial by jury. Congress reiterated "In criminal cases tried in the Superior Court in which according to the Constitution the defendant is entitled to a jury trial, the trial shall be by jury." (Underscoring supplied) 16 D. C. Code 705. This is hardly the language which the Congress would use if it chose to leave Constitutional rights to chance with relations to trials in the newly established Superior Court of the District of Columbia.

II.

THE SEVENTH AMENDMENT DOES NOT GUARANTEE A TRIAL BY JURY TO A TENANT WHO ASSERTS CLAIMS BY WAY OF EQUITABLE RELIEF TO A STATUTORY EVICTION PROCEEDING FOR NON-PAYMENT OF RENT.

A. Right to Trial by Jury as it Existed at Common Law and Equity.

The Seventh Amendment by its terms "preserves" the right of jury trial in suits at common law where the value of the controversy exceeds twenty dollars. History teaches us that the Framers of the Constitution were concerned with insuring that the right to trial by jury in civil cases was preserved to the States. This was in recognition of the diversity in how various civil actions in the States were tried and a fear that civil juries might be abolished unless protected by express language in the Constitution. 2. M. Farrand, Records of the Federal Convention 587 (1911); Henderson, "The Background of the Seventh Amendment," 80 Harvard Law Review 289 (1966); The Federalist Papers, No. 83; *Parsons v. Bedford*, 28 U.S. 443, 446 (1830).

Suits at common law with reference to the Seventh Amendment have been interpreted to exclude suits in equity and admirality. This was the view of Justice Story that the words common law established a general rules in the trial of civil cases. In his Commentaries on the Seventh Amendment and the Judiciary Act of 1789 he writes "The phrase 'common law' found in this clause is used in contradistinction to equity, and admirality and maritime jurisprudence—It

is well known that in civil causes, in courts of equity and admirality, juries do not intervene, and that courts of equity used trial by jury only in extraordinary cases to inform the conscience of the court." 3 J. Story, Commentaries on the Constitution of the United States, 645-646 (L. Levy, Ed. 1970).

B. Tenant Relief Is Equitable By Way of Recoupment and Set Off.

The petitioner has characterized the recovery he seeks as money claims by way of damages for breach of lease obligation. The fact of the matter is that the landlord has not sued to recover for rent due. Such an action would be one in law for contractual breach of a lease provision. A counterclaim to such suit would probably fit the better definition of a legal claim for damages. This suit by the landlord was solely for statutory eviction due to non payment of rent. The landlord is in effect saying pay the rent due or return possession of my property back to me. If the rent is not owing then the landlord cannot repossess his property. What the tenant is seeking is *not* damages. Rather he is asserting that he does not owe the amount of the rent which the landlord claims is due him because such amount should be reduced or diminished for the reasons set forth in his pleadings. If he can establish that dimunition equals the amount of rent due then he has of course prevailed against the landlord who may not repossess for non-payment of the rent. The court below was correct in characterizing the tenant's claims as those of equitable relief by way of equitable recoupment and set off. Recoupment exists in equity as well as common law while "set off" is a right long granted in equity to avoid

circuity of action. 20 Am. Jur. 2nd. Counterclaim, Recoupment and Set Off, Section 6 and Section 7. Thus equitable recoupment and set off being rooted in equity are not triable by jury within the admonition of the Seventh Amendment. James "Right to a Jury Trial in Civil Actions," 72 Yale L. J. 655 (1963).

C. Ruling in Beacon Theatres is not Controlling in Actions Arising in the Landlord and Tenant Branch, Superior Court of the District of Columbia.

In *Beacon Theatres v. Westover*, 359 U.S. 500 (1959) this Court held that a Federal court could not, in a controversy containing both legal and equitable elements with common factual issues, deprive a litigant of his right to jury trial on issues material to the legal elements by ordering first the disposal of the equitable elements. The reasoning of the court was predicated upon its re-evaluation of the liberal joinder provisions of the Federal Rules and its reconsideration of equitable remedies in view of the Declaratory Judgment Act, 359 U.S. 508-509. Again in *Dairy Queen v. Wood*, 369 U.S. 469 (1962), this Court reiterated the need to join legal and equitable issues in a single action so that the right to trial by jury would not depend on the choice of words used in pleadings. Here again the Court was construing the application of the Federal Rules of Civil Procedure to actions in Federal Courts.

The plenary legislative power of Congress with respect to the District of Columbia is well established under the Constitution Art. I, Sec. 8, Cl. 17. Not only may Statutes of Congress passed for national

purposes be made applicable to the District of Columbia but the Congress can exercise all police and regulatory powers which a state legislature or municipal government would have in legislating local matters, *Palmore v. United States*, 411 U.S. 389 (1973).

In legislation creating the trial courts for the District of Columbia, Congress has consistently avoided making the Federal Rules of Civil Procedure applicable to the extent that Federal Rules of Civil Procedure are applicable to Federal Courts. It is indicative of Congress's awareness that procedural rules for courts dealing with local matters at the municipal level are vastly different from the kinds of intricate legal problems generated by the numerous Federal questions litigated in Federal courts. 11 D. C. Code 946 provides in part:

> "The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure–unless it prescribes or adopts rules which modify those Rules. Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals and they shall not take effect until approval by that court."

Pursuant to the authority granted by Congress to the Superior Court and the District of Columbia Court of Appeals, rules were adopted, effective February 1st, 1971, for proceedings in the Landlord and Tenant Branch, D. C. Superior Court to govern the procedures in summary proceedings for possession pursuant to 45 D. C. Code 909 and 16 D. C. Code 1501, Rule 1 enjoins that the rules:

> "Shall be construed to secure the just, speedy and inexpensive determination of every action."

Rule 2 is authority for excluding most of the Superior Court Rules of Civil Procedure including Rule 13 which reads almost identical with Rule 13 of the Federal Rules of Civil Procedure concerning compulsory and permissive counterclaims. Rule 2 adopts for the Landlord and Tenant Branch certain of the rules of the Superior Court Rules of Civil Procedure excepting where such adopted rules are inconsistent with the provisions of the Landlord and Tenant Rules or the summary nature of the proceedings in the Branch. The rules currently governing procedures in the Landlord and Tenant Branch which seek to implement speedy determination of summary proceedings between landlord and tenant are consistent with rules which have prevailed previously in the Landlord and Tenant Branches of the former D. C. Municipal Court and D. C. Court of General Sessions, e.g. rules for Landlord and Tenant Branch, District of Columbia Municipal Court January 1952, and Rules for the Landlord and Tenant Branch, D. C. Court of General Sessions, January 1964.

If it is argued that the principles of *Beacon Theatres* and *Dairy Queen* ought be applied to the District of Columbia Courts because those Courts have adopted rules which parallel in some particulars the Federal Rules of Civil Procedure, this Court's statement in Beacon Theatres that "Our decision is consistent with the plan of Federal Rules and The Declaratory Judgment Act to effect substantial procedural reform while retaining a distinction between jury and non-jury issues and leaving substantive rights unchanged," 359 U.S. 508, 509 is most appropriate. This Court's affirmation of the distinction between jury and non-jury issues, that is to say actions at law

and actions in equity is of pertinency to procedures pertaining to actions between landlords and tenants in the District of Columbia, where the District of Columbia Courts have traditionally maintained the substantive right of the landlord to bring a summary proceeding for repossession of his property for non-payment of rent defensible by the tenant only on equitable grounds.

D. Tenant's Defenses to Landlord's Summary Proceedings Are Equitable Only.

In 1936 the United States Court of Appeals for the District of Columbia in *Smith v. O'Connor*, 88 F.2d 749, (1936) ruled that a denial of any default in rent payment is in effect an equitable defense to the landlord's claim for possession. The court cited this Court's opinion in *Dushane v. Benedict*, 120 U.S. 630 (1886) wherein on page 648, this Court stated,

> "By way or recoupment or equitable defense, which is limited to defeating the plaintiff's action, in whole or in part, the defendants may avail themselves of any evidence tending to show that by reason, either of a breach of warranty, or of a fraudulent representation, the goods were worth less than they would have been if they had been such as they were warranted or represented to be; as well as of any evidence tending to show that the defendants suffered damages, which, in the contemplation of the parties, or according to the natural or usual course of things, were the consequence of the breach of warranty, or the fraudulent representation.
>
> But under their counterclaim, seeking, as permitted by the statute of Pennsylvania, not only to defeat the plaintiff's action, but also to re-

> cover an affirmative judgment against him, they can avail themselves only of a claim sounding in contract, in the nature of an action to assumpsit upon the supposed warranty. If they fail to prove a warranty, express or implied, the statute can have no application; because it extends to no claim sounding in tort only, whether in the nature of an action of deciet, or of such an action as these defendants might maintain against a person, with whom they never had any contract, who wilfully or negligently introduced the small-pox into their mill."

Numerous cases of the District of Columbia Court of Appeals have reaffirmed the well settled rule that equitable defenses may be asserted to the landlord's claim for possession, to avoid circuity of actions and in denial of default to the landlord's complaint of non-payment of rent. *Worthington v. Levy*, 204 A.2d 334 (1964) and cases cited therein. The District of Columbia Court of Appeals in the *Worthington* decision commenting on landlord and tenant law in the District of Columbia informs us that the trial court may find the amount in arrears even though no money judgment is claimed, so the tenant might know the amount owing and pay such arrears to defeat the landlord's claim for possession. The trial court in *Worthington* having determined the amount of the rental arrears treated the defense which was classified as a counterclaim, as harmless error, since no money judgment was demanded by the landlord and the court considered the counterclaim as a denial of delinquency in rent as an equitable defense. The D. C. Appellate Court in *Worthington* approved the trial court's application of such rule of law. This is in our opinion the correct interpretation and application of the phrase

"counterclaim" as used in landlord and tenant actions where it is asserted against a landlord seeking only repossession based upon non-payment of rent. By electing not to in the same complaint to seek rent due or past due, the landlord is reserving his remedy to a subsequent action founded in contract to where the tenant can defend by way of seeking a money judgment based on landlord's claim for rent.

To permit the tenant to defend by way of counterclaim seeking a money judgment under Rule 5(b) gives his procedural rights akin to counterclaim pleadings under rule 13 even though rule 13 is not applicable to actions in the Landlord and Tenant Branch.

To assert that the tenant's defense to landlord's suit for repossession converts the summary proceeding into an action at law by asserting a counterclaim under Rule 5(b) is contrary to owner's property rights when viewed in the historical content of forcible entry and detainer statutes and their evolution to present day actions for summary proceedings. Property rights rooted in our common and substantive laws are protected by the Due Process Clause of the Constitution. Ownership connotates rights to possession to exclusion of all. For a rule of court to be applied to compel a landlord to maintain a tenant with no right to possession in possession while the tenant asserts a claim for a money judgment raised as a legal defense by the tenant as a counterclaim is a deprivation of the landlord's property rights. Such application of the rule is inconsistent with the orderly development of a summary proceeding to recover real peroperty without resorting to self-help. A person's right to exercise the ownership rights of his property to the summary exclusion of others in his possessory action has been stressed by this Court in *Grant Timber & Mfg. Co. v. Gray*, 236 U.S. 133 (1915); *Bianchi v. Morales*, 262 U.S. 170

(1923). The property owner's right to his property was recently re-emphasized by this Court in *Lindsey v. Normet*, 405 U.S. 56 (1972) where at page 68 it is stated: "Likewise, the Constitution does not authorize us to require that the terms of an otherwise expired tenancy be extended while the tenant's damage claims against the landlord are litigated."

Our argument is that the law of the District of Columbia permits only equitable defense to summary proceedings for the repossession of property and permits no claims for money judgment against one seeking only return of his property. The California Court is supportive of our argument when in *Union Oil Co. v. Chandler*, 84 Cal. Reporter 756 (1970) it was held that when the sole issue is right to possession neither counterclaim or cross complaints or affirmative defenses are admissable even though the alleged claim contained therein grew out of the subject matter involved. To permit such defenses would defeat the purpose of the summary remedy statutes and frustrate the landlord's right to restitution. In New York it has been held that counterclaim for money damages may not be interposed in summary proceedings seeking only possession of property. *Krutzeck v. Kruse*, 165 N. Y. S.2d 244 (1957).

It is not specifically known what the draftsman intended by the language used in Rule 5(b), D. C. Superior Court Rules of Procedures of the Landlord and Tenant Branch. Assuming that he is aware of this Court's opinion in *Washington-Southern Navigation Co. v. Baltimore & Phila. Steamboat Co.*, 263 U.S. 629 (1923) where on page 635, Mr. Justice Brandeis wrote:

> "The function of the rules is to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other things, the regulations of the forms, operation

> and effect of process; and the prescribing of forms, modes and time for proceedings. Most rules are merely a formulation of the previous practice of the courts. Occasionally, a rule is employed to express, in convenient form, as applicable to certain classes of cases, a principle of substantive law which has been established by statute or decisions. But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. This is true, whether the court to which the rules apply be one of law, of equity or of admiralty. It is true of rules of practice prescribed by this Court for inferior tribunals, as it is of those rules which lower courts make for their own guidance under authority conferred." (Underscoring supplied)

We can only conclude that his language in Rule 5(b) was not intended to convert equitable defenses into legal defenses interposed against a landlord who in a summary proceeding is seeking repossession of his property for non-payment of rent. To have done this would convert the summary proceeding into a trial by jury. The rule under such interpretation would be contrary to the express intent of Congress when it abolished the right to trial by jury in actions for the repossession of real property. For all the tenant need do is to answer the landlord's claim by way of a counterclaim for money judgment thus compelling the trial court to empanel a jury. By pleading thusly, the tenant thwarts the summary nature of proceedings given the landlord by virtue of 16 D. C. Code 1501-1505, violates the landlord's Constitutional rights of due process to exclusive ownership of his property and thwarts Congress's injunction that jury trials are abolished in actions for the possession of real property.

The rationale and need for summary proceedings in landlord and tenant actions in the District of Columbia to

be swift and without delay by litigating other issues when the landlord seeks repossession of his property is described in the recent case of *Tutt v. Doby*, 459 F.2d 1195 (1972). There the court held that a default judgment in a suit for possession of premises based on non-payment of rent initiated by posting a summons on the tenant's door did not operate to make the issue of rent res adjudicata thus barring a subsequent suit by the landlord for the unpaid rent. The Court's comments on the nature of the summary procedure and the imperative need of such procedure is described on pages 174 and 176:

"The summary procedure is provided by the legislature to provide Court relief to the landlord, otherwise trapped by the 'relatively slow, fairly complex and substantially expensive procedure' of the commons law possessory action of ejectment; to avoid resort to self-help and force, condoned at common law as justified; and to permit an expenditious judicial determination of what remains a possessory action.

While there is no summary action for money due, the provision of a summary proceeding for the possession action harmonizes considerations of fairness with the felt need for expedition in settling possessory rights. On the one hand, there is need for dispatch in determining the right of the businessman to occupancy of rented premises. On the other hand, tenants may be relatively unconcerned with the matter of possession—they may indeed be ready to quit the premises of the landlord with whom they have had bitter disputes—but may be far from acquiescent on the matter of whether, and how much money is owed.

This principle for limitation of collateral estoppel effect of default judgments is rooted in the interest of justice, not only to the particular parties, but in overall administration. The doctrine of collateral estoppel is

intended to curtail needless litigation. If it were construed to require litigation by a tenant who does not contest the possessory relief sought, it would undermine the utility and indeed the very premises of the summary procedure, that expedition is appropriate because all that is involved is possession. The docket of the Landlord and Tenant Branch is crushing. We are advised that in 1969, 118,811 possessory cases were filed, almost 80,000 resulted in default judgments and another 32,000 were dismissed. Only a very small percentage of the cases-about 3%-ever got beyond the threshold state. If a tenant is ready to yield the possession that gives the landlord all the relief he sought in the possessory action, it is neither good administration nor just to require the proceeding to be delayed or protracted so as to litigate the issue of rent. The issue should be litigated separately, and de novo, according to the notice provided by law for personal actions for rent due."

E. Practical Considerations Do Not Favor Trial of Tenant's Money Damages by a Jury.

Petitioner's argument (Petitioner's Brief 49-52) for judicial efficiency by compelled merger of all "claims" arising in landlord and tenant in a single cause of action would in the name of efficiency destroy the right of a property owner to immediate repossession of his property. He would be precluded from using the summary procedure granted to him by Congress. What petitioner seeks to have the Court do may only be accomplished by Congress subject to the Constitutional requirements of Due Process. It is inferred that the alternative pleadings set out in Landlord and Tenant Rule 3 (either rent or repossession or both) and Landlord and Tenant Rule 5(b) (tenant's defenses) govern issues which are so intertwined and interwoven that a single case is compellable. Here

again the priority rule of *Beacon Theaters* and *Dairy Queen* is asserted but at this juncture it is equated to judicial efficiency. To adopt the petitioner's reasoning in this regard infers that the lower court should rewrite its rules of procedure in the Landlord and Tenant Branch.

To the respondent, the logic of the petitioner's argument for judicial efficiency, insofar as it pertains to the questions in this case, makes out a better case for a trial before a judge without a jury, if judicial efficiency were the paramount matter being considered here.

CONCLUSION

For the reasons stated, the judgment of the District of Columbia Court of Appeals should be affirmed.

Respectfully submitted,

Herman Miller
400-5th Street, N.W.
Washington, D.C. 20001
Attorney for Respondent

Of Counsel
Michael Ross

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